

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

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ALEXANDER L. STEVENS,
CLERK

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BLACKSTONE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit

**MEMORANDUM FOR BLACKSTONE COMPANY
IN OPPOSITION**

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JOSEPH P. PARAVAC,
On the Memorandum.

NO. 82-1105

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Blackstone Company opposes the granting of the National Labor Relations Board's petition for a writ of certiorari because the Board: (1) misstates the question presented to the Court, and (2) asks the Court to decide this case on the facts of a markedly different and less compelling case, *NLRB v. Transportation Management Corp.*, No. 82-168.

The Board frames the question presented as follows:

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities. (Emphasis added).

The Board's statement of the question presented incorrectly presumes that General Counsel has established an illicit motivation for discharge by a "preponderance of the evidence." However, *Wright Line* does not require that General Counsel bear such a substantial initial burden. Rather, General Counsel merely has the burden of making a "*prima facie*" showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line, A Division of Wright Line Inc.*, 251 NLRB 1083, 1089 (1980).

The distinction between General Counsel's initial burden of proof under *Wright Line* and the Solicitor General's characterization of that burden is significant, in view of the burden of persuasion which *Wright Line* then shifts to the employer. If the employer fails to meet that burden, General Counsel does not retain the ultimate burden to prove a violation by a preponderance of the evidence. To the contrary, under *Wright Line* the violation is then deemed proven based upon the initial *prima facie* showing. Indeed, the fundamental difficulty with the *Wright Line* test is that General Counsel is never required to affirmatively prove a violation by a preponderance of the

evidence.¹ Thus, by incorporating the "preponderance of the evidence" standard into General Counsel's initial burden of going forward, the Solicitor General attempts to remedy a fatal defect in the *Wright Line* test.

As set forth in Blackstone's cross-petition for a writ of certiorari, the facts of the case *sub judice* offer the Court a more meaningful context to evaluate the impact of the Board's burden-shifting approach, due to the weakness of the *prima facie* showing and the strength of the legitimate business reason articulated by the employer. Thus, we respectfully urge the Court to deny the Board's petition for a writ of certiorari and to grant Blackstone's cross-petition in case No. 82-1305.

Respectfully submitted,

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JOSEPH P. PARANAC,
On the Memorandum.

¹ Moreover, the fallacy of this approach is exacerbated by the Board policy that where:

the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found.